Supreme Court, U.S.
FILED

95 1544 JAN 22 1996

In the Supreme Court of the United States

October Term, 1995

No. 95-_____

ANTHONY J. BURKHART,
CARMELLA L. BURKHART, H/W,

Petitioners,

VS.

LOUIS P. AGOSTINI, JR., ESQUIRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Anthony J. Burkhart
Carmella L. Burkhart
7 Cavallero Court
New Castle, DE 19720
(302) 324-9771

44 pp

QUESTION PRESENTED FOR REVIEW

Whether the Delaware Superior Court's denial of Petitioners' motion for relief from judgment arbitrarily infringed upon Petitioners' right to substantive due process under the Fourteenth Amendment of the United States Constitution when Petitioners had satisfied the requirements for obtaining this relief?

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STATEMENT OF JURISDICTION

Petitioners seek relief from the October 10, 1995 final order of the Delaware Supreme Court [1a][1] affirming the Delaware Superior Court's order dated December 22, 1994, which denied Petitioners' motion for relief from judgment under Del. Super. Ct. Civ. R. 60(b)(1). Petitioners averred to the Delaware Supreme Court that the Superior Court's order should be reversed because, *inter alia*, it arbitrarily violated their right to substantive due process under the Fourteenth Amendment of the United States Constitution. The Delaware Supreme Court noted the constitutional argument in its order of affirmance. [2a-3a]. Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review, by writ of certiorari, the final judgment of the highest court of a state, when the final judgment infringes on rights secured under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners seek review of a decision infringing upon their substantive due process rights secured by the Fourteenth Amendment of the United States Constitution, which provides in relevant part:

> [N]or shall any state deny to any person of life, liberty, or property without due process of law....

U.S. Const., Amend. XIV.

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1. The order of the Delaware Supreme Court is reprinted in the Appendix to this Petition for Writ of Certiorari. Citations to this Appendix are made to the page number therein as "[____a]."

STATEMENT OF THE CASE

1. The Litigation Below

Petitioners in this Court, Anthony J. and Carmella Burkhart, commenced an action for legal malpractice against their former attorney, Louis P. Agostini, Jr., Esquire ("Respondent"), in the Delaware Superior Court, in and for New Castle County, on September 8, 1992, *Burkhart v. Agostini*, Civil Action No. 92-C-09-041. [4a]. The complaint alleged that Respondent was liable for legal malpractice because in January 1991 he had voluntarily dismissed Petitioners' medical malpractice action without obtaining their advice and consent.

On June 28, 1994, Respondent filed a motion to dismiss the action because of Petitioners' alleged failure to obtain medical and legal experts. In response to the motion, Petitioners produced the reports of their legal malpractice expert, Samuel Stretton, Esquire, and their medical malpractice expert, Laurence J. Adams, M.D.

Dr. Adams' report was later amended. In the first three pages of the original report, Dr. Adams reviewed Petitioners' medical history, and set forth his opinion whether Petitioners' medical problems had been caused by the defendants in the original medical malpractice action. Petitioners' counsel later notified Dr. Adams that he neglected to discuss the applicable standard of care, and whether the medical malpractice defendants had breached that standard. Dr. Adams then prepared an amended page four addressing this issue:

> Injury to the femoral artery is a well established complication of threading a catheter through the femoral area into the proximal aorta. Lifting up of the intima or formation of clots follow catheterization of the vessel on occasion. ***The***

arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk.

Revised Report of Dr. Adams, June 13, 1994 (emphasis added). [16a].

Upon receipt of the revision, Petitioners' counsel faxed and mailed a copy to Respondent's counsel.

A hearing was held before the trial court on July 22, 1994 to consider Respondent's motion to dismiss. Before the hearing commenced, Petitioners trial counsel conferred with Respondent's counsel outside the courtroom. During this conversation, Petitioners' counsel learned that Respondent's counsel had not received the amended page four. Petitioners' counsel then called his office to arrange for a copy to be faxed to the trial court's chambers.

After hearing argument by counsel, the Court, relying on the original report of Dr. Adams, held that his report was legally insufficient to establish medical malpractice. The motion to dismiss was therefore granted. The Court acknowledged that it had been apprised of the amended report, but stated that it would not consider it:

The Court: With regard to Dr. Adams, Petitioners' counsel has furnished the Court with an opinion that does not state that any of the defendant physicians breached the, standard of care. ***I understand [Petitioners' counsel's] explanation, that there is a different page four, but I'm not going to act on the basis of a phantom page four, I'm only going to go on what has been presented to me.***

Dr. Adams expresses no opinion whatsoever as to whether the physicians who treated [Petitioner]

> breached any standard of care, and is problematical in his opinion as to causation. He says that [Petitioner's] problem could have been caused by an obstruction of the aorta, that's a long way from saying that it was.
>
> In short, the missing link is still missing in this case, and given the fact that the injury occurred in 1984, and the original lawsuit was filed in 1986, it seems clear that the missing link will never be supplied.
>
> This may be a case where — probably is a case where an injury occurred in the absence of negligence, and that's a shame. But having had eight to 10 years to develop an expert who will say that the doctors, who originally treated [Petitioner] breached a standard of care, and not having found any such person, the Court is going to act on the basis of the opinion that it has been supplied with, and those opinions are insufficient to support a claim of medical malpractice and consequently a claim of legal malpractice. The motion to dismiss will therefore be granted.

July 22, 1994 Hearing. [19a-20a].

Petitioners' counsel then asked the Court for permission to provide the Court with the amended page four:

Petitioners' counsel: Will Your Honor not give me an opportunity to provide you with another page four?

The Court: If there was another page four I would expect you to have it to me here today.

July 22, 1994 Hearing. [20a].

After the trial court announced that it would be dismissing the action, Petitioners' counsel went to chambers to determine if the amended page four had been received. While Petitioners' counsel was out of the court room, the trial court announced:

> The Court: The record should reflect that before the Court ruled fully, [Petitioners' counsel] left the courtroom, presumably to see if he could find the missing page four. Since that time, my secretary has come to the courtroom and supplied me with what I guess is the new page four. I have read that, and I will not alter my opinion at the present time. As I indicated when [Petitioners' counsel] was here, he may make it the subject of a motion for reargument if he wishes.
>
> And I have changed the order to read this way, "This action is dismissed with prejudice against the defendant for plaintiffs' failure to provide the opinions of legal and medical experts that defendant had breached the appropriate standard of care."
>
> The Court will now be in recess.
>
> July 22, 1994 Hearing. [22a].

Although the trial court announced from the bench that it would be granting the motion to dismiss, Petitioners' counsel never received a copy of the order. When Petitioners' counsel learned that the action been dismissed, he filed a motion for relief under Del. Super. Ct. Civ. R. 60(b)(1) on December 8, 1994. The motion averred that the order dismissing the action for failure to produce adequate expert reports should be vacated because the Court only considered the original copy of Dr. Adams' expert report and failed to consider the *amended* page four, which sets forth

the requisite causation language demonstrating that Petitioners' injury was caused by the medical malpractice defendants' negligence. The motion further averred that the Court's failure to consider the amended report resulted from inadvertence and was thus properly subject to a Rule 60(b) motion for relief from judgment.[2]

The trial court heard argument on the motion for relief from judgment on December 22, 1994 and denied the motion. The revised page four would not have changed the outcome of the prior order dismissing the action, the trial judge said, because the revised page four was still legally insufficient to show a *prima facie* case of medical malpractice. Petitioners appealed this order to the Delaware Supreme Court. By order dated October 10, 1995, the Delaware Supreme Court affirmed the Superior Court's order of dismissal.

2. **Preservation of Supreme Court Jurisdiction**

Petitioners argued to the Delaware Supreme Court that the trial court's denial of the motion for reconsideration violated Petitioners' constitutional right to substantive due process under the constitution of the United States because they were denied fair legal process. The Delaware Supreme Court specifically acknowledged the federal constitutional argument in its order of affirmance. [2a-3a]. Petitioners thus preserved federal jurisdiction in accordance with Sup. Ct. R. 14(g)(i).

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2. Del. Sup. Ct. Civ. R. 60(b)(1) is identical to Fed. R. Civ. P. 60(b)(1). *See Burkhart v. Davis*, Del. Supr., 602 A.2d 56, 59 (1991) ("The Superior Court's Civil Rules are patterned upon the Federal Rules of Civil Procedure.") (citation omitted).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF GRAVE PUBLIC IMPORTANCE

The Delaware Supreme Court's order affirming the trial court's order denying the motion for relief from judgment has weighty implications for the due process clause of the Fourteenth Amendment of the United States Constitution. By affirming the lower court's order, the Delaware Supreme Court ratified the arbitrary deprivation of Petitioners' constitutionally protected property interest in their action. The *sub silentio* message is that courts may capriciously infringe on citizens' rights without regard to the Fourteenth Amendment. This Court should exercise its discretion to grant the writ, informed by the considerations set forth in Sup. Ct. R. 10(c), to signal the lower courts that trampling upon citizens' constitutionally protected rights will not be tolerated.[3]

The due process clause of the fourteenth amendment provides that no state shall deprive "any person of life, liberty or property without due process of law." U.S. Const., Amend. XIV. This Court has long recognized that the clause provides two kinds of protection when a state attempts to deprive a citizen of life, liberty or property: the guarantee that a person shall have procedural protection, such as notice and a hearing, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); and the guarantee that the laws allowing for deprivation of life, liberty and property are substantively fair. *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986). As this Court recently remarked:

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3. Under Sup. Ct. R. 10(c), one consideration for granting a petition for writ of certiorari is when a state court of last resort "has decided an important question of federal law that has not been, but should be, settled by this Court . . . ."

> Although a literal reading of the [due process] Clause [of the fourteenth amendment] might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since *Mugler* v. *Kansas*, 123 U.S. 623, 660–661 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.

Planned Parenthood v. Casey, 505 U.S. ___, ___ , 112 S. Ct. 2791, 2804 (1992) (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.).

The substantive element of the clause has a twofold interpretation. First, the clause selectively incorporates provisions of the Bill of Rights, and protects these rights from infringement by state and local governments. Second, the clause bars "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels*, 474 U.S. at 331. Thus, the substantive element of the clause "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165 (1952)). *See also Taylor Investment v. Upper Darby Township*, 983 F.2d 1285, 1292 (CA3 1993) (substantive due process violation occurs when person is "deprived of a property interest because of either arbitrary and capricious government action or a denial of fair legal process.")

The gravamen of this petition is that the lower courts infringed on Petitioners's constitutionally protected interest in their action by denying their motion for relief from the order of dismissal when Petitioners had satisfied the standard under Del. Sup. Ct. R. 60(b)(1) for obtaining this relief. Petitioners established that the order of dismissal was improvidently granted because the Court failed to consider the revised page four of Petitioners' medical expert. Petitioners established that the court's failure to consider the revised page resulted from inadvertence, within the meaning of Rule 60(b).

But when confronted with the revised page four at the hearing on the motion to open the judgment, Judge Babiarz made a mockery of the substantive due process protection of the Fourteenth Amendment by basing its rejection of the revised page four on a flawed understanding of Delaware malpractice law:

> The Court: I would also add that I considered the additional page back on July 22nd of 1994, and I found that it still is insufficient. The language that I'm sure Mr. Van Loan would point to is the opinion expressed in the very last sentence of Dr. Adams' letter that the arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk. That's basically support for a claim of breach of the informed consent doctrine, which is set forth in 18 Delaware Code, Section 6852 Sub (a). And standing alone, that opinion is plainly insufficient. In order to support such a claim, the plaintiff is obliged not just to establish factually that the doctor failed to warn the patient of a given risk, but that the failure to do so — or that doing so was customary in this community, and that's obviously another matter that is not at all covered in Dr. Adam's

> statement. So even the amended opinion is insufficient and would not have caused me to change my mind, had it been argued in a timely fashion.

December 22, 1994 Transcript. [24a-25a].

Judge Babiarz' basis for denying the motion for relief from judgment — that the revised page four was legally insufficient to establish an informed consent action under the Delaware Code — is patently deficient. To prevail in an informed consent action, Petitioners had to demonstrate that

> (1) The injury alleged involved a non-emergency treatment procedure or surgery;
>
> (2) The injured party proved by a preponderance of evidence that the health care provider did not supply information regarding such treatment, procedure of surgery, to the extent customarily given to patients or other persons authorized to give consent for patients, by other licensed health care providers with similar training and/or experience in the same or similar health care communities as that of the defendant at the time of the treatment, procedure or surgery.

18 Del. C. § 6852(a).

The plain language of the statute contemplates that a doctor will provide a patient with information about a contemplated procedure that is customarily provided by other doctors with similar training and/or experience. Dr. Adams' report stated that *"[t]he arteriographic surgeon breached the*

standard of care when he failed to warn the patient of the risk [of injury to the femoral artery]. [16a]. It is self-evident that Dr. Adams' statement necessarily implied that it would have been customary to warn patients of the risks at the time of treatment. By definition, "standard of care" in a medical malpractice context means the way in which reasonably prudent, similarly situated doctors would have performed a given medical procedure or service. Thus, to say that the "arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk" is simply another way of saying that it was customary for doctors performing arteriogram to warn of the risk of injury to the femoral artery.

Judge Babiarz thus committed flagrant error in denying the motion for relief from judgment when plainly Petitioners had an expert report demonstrating breach of informed consent in accordance with the Delaware statute. This denial had the effect of dismissing Petitioners' action, in which Petitioners hold a constitutionally protected property interest,[4] and denying them substantive due process through arbitrary government action and a denial of fair legal process. *See Taylor,* 983 F.2d at 1292 (substantive due process violation occurs when person is "deprived of a property interest because of either arbitrary and capricious government action or a denial of fair legal process.") Had Judge Babiarz simply followed the cardinal rule of statutory construction that courts

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4. Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Here the state of Delaware statutorily created Petitioners' property interest in their action for breach of informed consent. 18 Del. C. § 6852(a).

must apply the plain language of the statute,[5] he would have had to grant Petitioners' motion for relief. These Petitioners would then have finally obtained their rightful "day in court" to obtain compensation for the horrendous injury they have suffered as a result of Respondent's actions in allowing their medical malpractice action to be dismissed.

It bears emphasizing that Petitioners have attempted for ten years to obtain redress of their grievances through the Delaware courts. They valiantly carried on their legal battle against resources far greater then their own. Though Petitioners sought only a trial before a jury of their peers, the Delaware court system stood in opposition to this constitutionally guaranteed right.

This petition is their last attempt to obtain a trial by jury. If this Court denies this petition, the price paid amounts to many thousands of dollars and ten years of the lives of two people, which price will have been paid in vain. The outrageous actions of Judge Babiarz and the Delaware Supreme Court amount to a constitutional crime against the citizens of the State of Delaware: the theft of their liberty. These Petitioners sound the alarm and call this Court into action as the guardian of freedom.

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5. *See, e.g, Patterson v. Shumate*, 504 U.S. 753 (1992) (party seeking to defeat plain meaning of statute bears an "exceptionally heavy burden"); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) ("The starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.")

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of the State of Delaware entered on October 10, 1995.

Respectfully submitted,

ANTHONY J. AND CARMELLA BURKHART
PRO SE

DATED: January 20, 1996

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY J. BURKHART
CARMELLA L. BURKHART, H/W,

Plaintiffs Below,
Appellants,

v.

LOUIS P. AGOSTINI, JR., ESQUIRE,

Defendant Below,
Appellee.

No. 18, 1995

Court Below: Superior Court of the State of Delaware in and for New Castle County

C.A. No. 92C-09-04194-09833

Submitted: September 12, 1995
Decided: October 10, 1995

Before: **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices.

ORDER

This 10th Day of October 1995, upon consideration of the briefs of the parties, it appears to the Court that:

(1) Anthony J. Burkhart and Carmella L. Burkhart, plaintiffs below, appeal the denial by the Superior Court of their motion for relief pursuant to Superior Court Rule 60(b) from an order, dated July 222, 1994, dismissing their claim against defendant below, Louis P. Agostini. The plaintiffs did not timely file a motion

for reargument or a notice of appeal. The plaintiffs filed a motion under Rule 60(b) on December 8, 1994, and the Superior Court denied the motion on December 22, 1994.

(2) Superior Court Civil rule 60(b)(1) allows a court, in its discretion, to relieve a part of a judgment because of, *inter alia*, "[m]istake, inadvertence, surprise or excusable neglect; . . ." The Rule should not be used, however, as a substitute for a motion for reargument and an appeal. Dixon v. Delaware Olds, Inc, Del Supr. 405 A.2d 117, 119 (1979).

(3) The Plaintiff sought to use Rule 60(b) as a substitute for an appeal of the dismissal of their claim, and the Superior Court did not abuse its discretion in denying the plaintiffs' motion for relief.

(4) Plaintiffs also argue on appeal that the denial of the Rule 60(b) motion violates their rights to due process under the 14th Amendment to the United States Constitution. Reasonable procedural rules do not interfere with a litigant's due process rights. Logan v. Zimmermann Brush Co., 455 U.S. 422, 437, 102 S.Ct.

1148, 1158 (1982). Rule 60(b) is precisely such a reasonable procedural Rule.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

By the court:

/S

E. Norman Veasey
Chief Justice

SUPERIOR COURT - NEW CASTLE COUNTY
AS Of 03/08/95 PAGE 1

92C-09-041
FILED SEPTEMBER 08,1992
MALPRACTICE
NON ARBITRATION JURY TRIAL

SOLL MELVIN E ANTHONY J. BURKHART
CARMELLA L. BURKHART, H/W
-- VS --
ELZUFON JOHN A. LOUIS P. AGOSTINI, JR., ESQUIRE

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01/21/94	15	#14 PASSED - (REHEARD LATER AT MOTIONS' HOUR AT 12:00 P.M.) ORDER MODIFIED AND SIGNED BY J. SILVERMAN MAS
03/15/94	16	LETTER FROM J. SILVERMAN TO COUNSEL DATED 03/14/94 IN RESPONSE TO DEFTIS REQUEST FOR RECONSIDERATION OF THE COURT'S JAN 21, 1994 LETTER ALLOWING PLTF UNTIL MAY TO LOCATE EXPERTS. DEFT REQUEST THAT THE CUT OFF BE MOVED FORWARD TO MARCH. THE COURT STANDS BY ITS JAN 21, 1994 ORDER. BLB
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07/22/94	19	RE: MOTION To DISMISS DECISION: BABIARZ, J. GRANTED UPON FURNISHING THE COURT WITH MISSING INFORMATION FROM REPORT W/ARGUMENT WAS BASED -DEFTIS ATTY MAY FILE A MOTION FOR REARGUMENT. BLB

07/22/94 20 ORDER SIGNED BY BABIARZ, J. THIS ACTION IS DISMISSED WITH PREJUDICE AGAINST DEFT FOR PLTFS FAILURE TO PROVIDE THAT DEFT @ BREACHED THE APPROPRIATE STANDARD OF CASE. IT *IS SO* ORDERED. BLB

10/05/94 21 LETTER FROM RIDGELY P.J. TO DATED 10/4/94 YOUR LETTER DATED 9/27/94, REQUESTING THAT I "INTERVENE IN YOUR CASE HAS BEEN RECEIVED BY MY OFFICE. A REVIEW OF THE COURT DOCKET INDICATES THAT JUDGE BABIARZ SIGNED AN ORDER ON JULY 22, 1994 DISMISSING THE CASE WITH PREJUDICE. THE PRESIDENT JUDGE DOES NOT REVIEW THE CASE DECISIONS OF OTHER SUPERIOR COURT JUDGES, NOR DOES HE DIRECT THEM HOW ANY INDIVIDUAL CASE SHOULD BE HANDLED. BLB

12/13/94 22 PLTF NOTICE OF MOTION FOR RELIEF FROM ORDER OF 7/22/94 IS VACATED. WILL BE HEARD ON 12/22/94. BLB

12/19/94 23 DEFT OBJECTION TO PLTF MOTION FOR RELIEF FROM ORDER WILL BE HEARD ON 12/22/94. SENT TO ADM ON 12/20. BLB

12/19/94 #23 SIGNED BY BABIARZ, *J. ON* 12/22/94. BLB IT IS HEREBY ORDER THAT PLTF'S MOTION FOR RELIEF FROM AN ORDER DISMISSING THIS CASE AGAINST THE DEFT WITH PREJUDICE ON JULY 22, IS HEREBY DENIED. BLB

01/24/95 24 NOTICE OF APPEAL FROM SUPREME COURT #18,1995 BY THE PLTFS. BELOW-APPELLANTS APPEALING THE ORDER DATED 12/22/95 BEFORE BABIARZ, J. DIRECTIONS TO COURT REPORTER OF PROCEEDINGS BELOW TO BE TRANSCRIBED PURSUANT TO RULE 9(E). CAV

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Certified as a True Copy:
Attest: Sharon Agnew Prothonotary
By : _____ S
Carol Vannurcola

A-9

LAURENCE J. ADAMS, M.D, ASSOCIATES

Laurence J. Adams, MD, J.D.
Diplomate American Board of Neurosurgery (717) 397-1781
822 Marietta Avenue
Lancaster, PA 17603

June 13, 1994

Jonathan A. Van Loan Esquire
288 Lancaster Avenue
Frazer, PA. 19355

Re: Anthony Burkhart v. Agostini

Dear Mr Van Loan:

The issue is whether or not Mr Burkhart's organic impotence is directly related to a femoral injected arteriogram for study of his subclavian artery.

Impotence is an inability to have and maintain an erection and ejaculate. This is not a fertility problem as the sperm may be normal in number and quality.

With erection the vascular channels of the penis fill with blood and become engorged. Obstruction of the blood supply of the penis, Leriche syndrome or its variants; non functioning of the sympathetic nervous system or loss of sensation of the penis from a neurologic lesion are the cause. Neuropathy of the sympathetic nervous system or atherosclerosis of the vessels to the penis from diabetes is a common cause. Mr Burkhart's fasting sugar the one time in the record was 85 (normal)

Fifty percent of impotence is psychogenic. Psychogenic impotence versus organic is determined in the sleep lab. Normal males have an erection during REM sleep-while those with an organic disability do not. A sleep EEG is made and when REM sleep occurs the patient is tested for engorgement of his penis. If he has no engorgement the impotence is organic, if he does have

engorgement the impotence is psychologic. Using this criteria Mr Burkhart's is organic.

Burkhart states that on February 27, 1984, he had an arteriogram performed at the Wilmington Medical Center for a possible thoracic outlet syndrome. He states that since that time he has been impotent.

He injured his neck in 1981. While he was working he had a truck engine on a hand cart and was transferring it from one room to another. He states that he was pulling the handcart towards himself when it was pushed by another worker and at the same time dropped off a depression in the floor. He suffered a flexion-extension injury of his neck at that time. He developed pain almost immediately in his neck.

Following that he had a number of tests. He was treated by Doctor Montaleone in Wilmington. Doctor Davies, a thoracic surgeon, thought he had a thoracic outlet syndrome. Davies ordered two tests. One of these was the femoral injected arteriogram. In the first test they tried to thread some kind of catheter into his brachial vein. "The nurse who was doing this was not able to manage this and the procedure was stopped.

The same day they prepped him for an arteriogram through the femoral root. Doctor Ogelseby did it. Burkhart states that a catheter was placed in his right groin. He could feel it going up through the aorta to his subclavian vessel. When the catheter was in place they told him he was going to feel a hot sensation when they shot the dye. He did. The pain extended up into his neck. He states that they injected him a second or third time and then they pulled the catheter out. He remembers the doctor's hand shaking when he held his fingers over the femoral area to stop the bleeding. After they removed the catheter he felt like there was something still in there.

Next he remembers laying on a stretcher and the arteriographer telling him that things were fine. He never saw Doctor Oglelsby following the procedure. He remembers that he did not get anything to eat while he was in the hospital. He states that following that on the same day his wife wheeled him to the door in a wheelchair and he of hobbled out of the hospital.

When he got home he went directly into the house to urinate. While voiding he passed out and struck his head. Someone called 911 and an ambulance came directly to his home to get him. A paramedic said that he was in shock. He was returned to the hospital and then held 24 hours and discharged.

He was sore in his groin for a couple of months. When he tried to have sex he could not get an erection easily and when he did he lost it. He could feel sex but it was uncomfortable. He says that it feels like the time he slipped out of a girl on the beach and his penis fell into the sand; he now has this feeling all the time. He has diminished sensation in the right groin and the quadriceps area. He has a strange feeling behind his right calf. He did not have sex for two months following the arteriogram.

He got spasms between his shoulder blades six months later. He states that he called the doctor who had done the arteriograin and he laughed at him. He saw an urologist who told him to lose twenty-five pounds and gave a urine sample that normal.

He is not diabetic that he knows of. His back aches across the area where his belt presses. Sometimes this pain radiates down the left leg. At first he dragged his leg when he walked. This is not the case at present. He has lost about fifty pounds since the arteriogram. He has no pain straining. He has muscle spasms in his epigastric area and between his shoulder blades. He has frequency of urination and hesitancy. He has no nocturia. He was mildly constipated at first but not now. He and his wife have no children; this is through choice.

He had low back pain that he had treated by a chiropractor. An MRI of his lumbar spine shows a moderate sized disc herniation centrally and to the right. There is also bulging of the L-4 L-5 disc that fails to compress any nerve roots. He was not operated for the thoracic outlet syndrome. He states that he still has trouble with his neck and arms. He has "weakness" in the supraclavicular area. His hands want to turn in on themselves at times, carpal spasms. He does not admit to hyperventilation. He does not have claw feet. He has neck pain and headache since the accident. He has blurred vision in the right eye at times. He is right handed. He has no trouble with speech.

He has had no operations. He works part time in a liquor store that he owns with his wife. He tries to take a nap in the afternoon because of headaches. For the last fifteen months he wants to be by himself. He doesn't feel like laughing. He's depressed. He was on prozac but is not at present. His psychologic studies are consistent with the admitted depression. Although his mental status might contribute to his impotence or lack of interest in sex, he still failed to get an erection with REM sleep. The impotence is mostly organic.

He is oriented to time, place and person. He is cooperative but very tense. Pupils are equal and react both directly and consentually. Extraocular movement is normal. Fundi are normal.

Fields are full. Corneal reflexes are symmetrical. Facial motion and sensation are intact. Palate and tongue are in the midline. Hearing to whispered voice is normal. There is some resistance to extension of his neck. Blood pressure in the right arm is 120/70 and 140/80 in the left. Pulse is 80 and symmetrical. Adson's test bilaterally is normal. There is no weakness or anesthesia in his upper extremities. The reflex pattern is 1+ and symmetrical. There is no weakness, anesthesia or spasticity in his legs. There are no posterior column signs. The abdominal reflexes are 1+ in all four quadrants. The right knee jerk is absent, the left is 1+. The ankle jerks are absent. Peripheral pulses in his legs are palpable but obviously diminished. Straight leg raising is not limited. Forward bending is not limited.

He has a normal simus rhythm without murmers. There is no adenopathy. Chest is clear to auscultation and percussion. The abdominal wall is tense but there are no masses or organ enlargement.

Mr Burkhart underwent a sleep test to determine the organicity of his failure to obtain an erection. This demonstrated an organic cause for his problem. Obstruction of the small branches of the aortic bifurcation are a well known cause of impotence, the l,eriche syndrome. If we postulate that a small clot came off the arterial catheter or a portion of the intima of the artery was lifted to block the vessels it could very well have obstructed these vessels and resulted in impotence.

We have found no other cause of impotence. He would have had impotence prior to the arteriogram if there was an endocrine abnormality. on examination he has no anesthesia over his peroneum although he states feeling is not good there. The discomfort in his calf could be claudication from vascular insufficiency. He is not diabetic. There is no history of or cause of sympathetic nerve injury in his history.

I believe that the impotence was caused by vascular injury during the arteriogram. It dates from that event. Although he is depressed on testing his impotence is in most part organic.

Very truly yours,

/S
Laurence J. Adams M.D.

cc: Anthony Burkhart
LJA/bad

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I believe that the impotence was caused by vascular injury during the arteriogram. It dates from that event. Although he is depressed on testing his impotence is in most part organic.

Injury to the femoral artery is a well established complication of threading a catheter through the femoral area into the proximal aorta. Lifting up of the intima or formation of clots follow catheterization of the vessel on occasion. The arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk.

Very truly yours,

/S

Laurence J. Adams M.D.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANTHONY J. BURKHART CARMELLA L. BURKHART, h/w Plaintiffs,	)	Civil Action No. 92C-09-041
v LOUIS P. AGOSTINI, JR., ESQUIRE Defendant.	)	

BEFORE:
HONORABLE JOHN E. BABIARZ, JR., J.

APPEARANCES:

JONATHAN A. VAN LOAN, ESQ.
for the Plaintiffs

ANN D. CAREY, ESQ.
Elzufon Austin & Drexler
for the Defendant

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TRANSCRIPT
MOTION TO DISMISS
July 22, 1994

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SUPERIOR COURT OFFICIAL REPORTERS
1020 King Street - Wilmington, Delaware 19801
(302) 577-2400 Ext. 411

Superior Court Reporters
Wilmington, Delaware 19801

With regard to Dr. Adams, Mr.. Van Loan has furnished the Court with an opinion that does not state that any of the-defendant physicians breached the standard of care. I understand Mr. VanLoan's explanation, that there is a different page four, but I'm not going to act on the basis of a phantom page four, I'm only going to go on what has been presented to me.

Dr. Adams expresses no opinion whatsoever as to whether the physicians who treated Mr. Burkhart reached any standard of care, and is problematical in his opinion as to causation. He says that Mr. Burkhart's problem could have been caused by an obstruction of the aorta, that's a long way from saying that it was.

In short, the missing link is still missing in this case, and given the fact that the injury occurred in 1984, and the original lawsuit was filed in 1986, it seems clear that the missing link will never be supplied.

This may be a case where -- probably is a case where an injury occurred in the absence of negligence, and that's a shame. But having had eight

to 10 years to develop an, expert who will say that the doctors, who-originally treated Mr. Burkhart breached a standard of care, and, not having found any such person, the Court is going to act on the basis of the opinions that it has been supplied with, and those opinions are insufficient to support a claim of medical malpractice and consequently a claim of legal malpractice. The motion to dismiss will therefore be granted.

Is there an order attached, Ms. Carey?

MR. VAN LOAN: Will Your Honor not give me an opportunity to provide you with another page four?

THE COURT: If there was another page four I would expect you to have it to me here today.

MR. VAN LOAN: It's probably in the Court Administrator's --

THE COURT: It will only be considered on the basis of rearguing the motion.

MS. CAREY: I have a copy of

THE COURT: Well, let me see.

MS. CAREY: *The order is the same one that you have,* Your Honor.

THE COURT: That order will have to be

changed, because the basis of my dismissal was-the sufficiency of the opinions provided, not their existence.

MS. CAREY: I apologize. I overlooked getting a new order.

THE COURT: The record should-reflect that before the Court ruled fully, Mr. Van Loan left the courtroom, presumably to see if he could find the missing page four. Since that time, my secretary has come to the courtroom and supplied me with what I guess is the new page four. I have read that, and I will not alter my opinion at the present time. As I indicated when Mr. VanLoan was here, he may make it the subject of a motion for reargument if he wishes.

And I have changed the order to read this way, "This action is dismissed with prejudice against the defendant for plaintiff's failure to provide the opinions of legal and medical experts that defendant had breached the appropriate standard of care.

The Court will now be in recess.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANTHONY J. BURKHART	)	
CARMELLA L. BURKHART, h/w	)	
Plaintiffs,	)	Civil Action
	)	No. 92C-09-041
v.	)	
LOUIS P. AGOSTINI, JR.,	)	
ESQUIRE	)	
Defendant.	)	

BEFORE:

HONORABLE JOHN E. BABIARZ, JR., J.

APPEARANCES:

JONATHAN A. VAN LOAN, ESQ.
Attorney for the Plaintiffs

ELZUFON AUSTIN & DREXLER P.A.
By: ANN D. CAREY, ESQ.
Attorney for the Defendant

MOTION FOR RELIEF FROM ORDER
DECEMBER 22, 1994

OFFICIAL COURT REPORTERS
SUPERIOR COURT OF THE STATE OF DELAWARE
DANIEL L. HERRMANN COURTHOUSE, WILMINGTON, DELAWARE

a discipline imposed on myself and would not have bound the defendant in the case or affected the disposition of the Court in this case. And that's also something that is so clear that I don't think it really can be argued about.

So neither of those excuses is sufficient under Rule 60(b) to excuse the failure to file a motion for reargument under Rule 59. And on that basis, the motion is denied.

I would also add that I considered the additional page back on July 22nd of 1994, and I found that it still is insufficient. The language that I'm sure Mr. Van Loan would point to is the opinion expressed in the very last sentence of Dr. Adams' letter that the arteriographic surgeon breached the standard of care when he failed to warn the patient of this risk. That's basically support for a claim of breach of the informed consent doctrine, which is set forth in 18 Delaware Code, Section 6852 Sub (a). And standing alone, that opinion is plainly insufficient. In order to support such a claim, the plaintiff is obliged not just to establish factually that the doctor failed to warn

the patient of a given risk, but that the failure to do so -- or that doing so was customary in this community, and, that's obviously another matter that is not at all covered in Dr. Adam's statement. So even the amended opinion is insufficient and would not have caused me to change my mind, had it been argued in a timely fashion.

The motion for relief is denied. Court's in recess.

(Court recessed at 11:45 a.m. until the call of the Court.)